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# A PROPOSAL FOR THE ABOLITION OF THE DOMESTIC RELATIONS EXCEPTION

## I. INTRODUCTION

Title 28 of the United States Code, Section 1332, appears to grant original jurisdiction to the federal district courts in all civil actions which are between citizens of different states where the matter in controversy exceeds \$10,000.<sup>1</sup> This grant of diversity jurisdiction, however, has been limited by two well-established judicially created exceptions: the probate exception<sup>2</sup> and the domestic relations exception.<sup>3</sup> Until recently, these exceptions have not been the subject of extensive scholarly examination.<sup>4</sup> This comment exclusively examines

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1. The diversity statute, 28 U.S.C. § 1332 (1982), provides in pertinent part as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different or of different States.

*Id.* at § 1332(a).

2. In *Markham v. Allen*, 326 U.S. 490 (1946), the Supreme Court held that “a federal court has no jurisdiction to probate a will or administer an estate.” *Id.* at 494. See also *Moore v. Lindsey*, 662 F.2d 354 (5th Cir. 1981); *Rice v. Rice Found.*, 610 F.2d 471 (7th Cir. 1979). See generally C. WRIGHT, *LAW OF FEDERAL COURTS* § 25 (4th ed. 1983); Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 13-23 (1956); Note, *Federal Jurisdiction and Practice: Probate Matters*, 15 OKLA. L. REV. 462 (1962).

3. See, e.g., *Ohio ex rel. Popovici v. Alger*, 280 U.S. 379, 383 (1930) (federal courts have no jurisdiction over divorce); *Solomon v. Solomon*, 516 F.2d 1018, 1024 (3d Cir. 1975) (federal courts do not have jurisdiction in domestic relations suits). See generally C. WRIGHT, *supra* note 2; Vestal & Foster, *supra* note 2.

4. See Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571 (1984); Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1 (1984); Comment, *Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters*, 31 UCLA L. REV. 843 (1984) [hereinafter UCLA Comment]; Comment, *Enforcing State Domestic Relations Decrees in Federal Courts*, 50 U. CHI. L. REV. 1357 (1983), Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983). The probate exception was recently discussed in Note, *The “Probate Exception” to Federal Diversity Jurisdiction: Matters Related to Probate*, 48 MO. L. REV. 564 (1983).

the domestic relations exception and presents a proposal for its abolition.

The domestic relations exception mandates that federal courts dismiss a domestic relations case, even if it satisfies all of the requirements of the diversity statute,<sup>5</sup> because the court has no power to act.<sup>6</sup> Although the United States Supreme Court originally articulated the domestic relations exception in dicta,<sup>7</sup> and no authoritative analysis of its validity exists, federal courts continue to observe a "hands off"<sup>8</sup> policy in cases requiring an inquiry into a marital or parent-child relationship.<sup>9</sup> The breadth of the exception and the justifications for it remain unclear. In addition, the courts' application of the exception remains unpredictable and

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5. See *supra* note 2.

6. See, e.g., *Williamson v. Williamson*, 306 F. Supp. 516 (W.D. Okla. 1969) "[S]ubject matter jurisdiction . . . is wholly lacking in a federal court in spite of the fact that . . ." the jurisdictional requirements of 28 U.S.C. § 1332 (1982) have been satisfied. *Id.* at 518.

In addition to the domestic relations exception, federal courts may invoke abstention doctrines to decline jurisdiction in cases which they have the power to decide. Under the domestic relations exception once a case is characterized as a domestic relations case, jurisdiction does not exist. Conversely, abstention doctrines, which are judicially created, are characterized as only a postponement of proper jurisdiction. 1A J. MOORE, MOORE'S FEDERAL PRACTICE, § 0.203 (3d ed. 1985). The United States Supreme Court has sanctioned abstention in three instances. The Supreme Court has abstained when a state court decision might eliminate the need to decide a federal question. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). In addition, the Court has sanctioned abstention when the area of activity at issue is intimately regulated by a state. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Lastly, the Court has abstained if a state proceeding is pending. *Younger v. Harris*, 401 U.S. 37 (1971).

To avoid the inherent rigidity in the domestic relations exception, some commentators have proposed that abstention doctrines be used to limit the volume of domestic relations cases heard by federal courts. See *Atwood*, *supra* note 4, at 475; Note, *Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction*, 1983 DUKE L.J. 1095, 1120. A discussion of the application of the abstention doctrines to the domestic relations exception is beyond the scope of this comment.

7. *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858).

8. In *Kamhi v. Cohen*, 512 F.2d 1051 (2d Cir. 1975), the court stated that the Second Circuit would keep its "federal hands off actions which verge on the matrimonial or impinge upon the matrimonial jurisdiction of the state courts." *Id.* at 1056.

9. *Jagiella v. Jagiella*, 647 F.2d 561 (5th Cir. 1981). "The general inquiry is whether hearing the claim will necessitate the court's involvement in domestic issues, i.e., whether it will require inquiry into the marital or parent-child relationship." *Id.* at 565.

inconsistent.<sup>10</sup> Within recent years, a growing number of the federal courts have questioned the validity and the contours of the exception.<sup>11</sup> Nevertheless, absent an explicit repudiation of the exception by Congress or the Supreme Court, the lower courts appear to be unwilling to abolish the exception.<sup>12</sup>

This comment proposes the repudiation of the domestic relations exception. Part II explores the murky origins of the exception.<sup>13</sup> Part III presents the justifications that courts have used when they have invoked the exception.<sup>14</sup> Part IV discusses the federal courts' interpretations of the scope of the exception.<sup>15</sup> Part V critically analyzes the interpretations and justifications for the exception as they appear in the lower federal court decisions.<sup>16</sup> Finally, Part VI focuses on the policy grounds supporting the repudiation of the exception and concludes that the domestic relations exception ought to be abolished.

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10. The unsatisfactory state of the law in this area was noted in *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975) (Gibbons, J., dissenting). "[T]here is no well-established domestic relations exception . . . . Rather, there is a collection of misstatements of ancient holdings and ill-considered dicta." *Id.* at 1030.

11. *See, e.g., Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982). "The boundaries of the exception are uncertain . . . ." *Id.* at 492; *Allen v. Allen*, 518 F. Supp. 1234 (E.D. Pa. 1981). "The critical question, of course, is what a domestic relations case is . . . . [There is] a large 'gray area' for future caselaw [sic] development." *Id.* at 1236.

The domestic relations exception has been traditionally viewed as an exception to federal diversity jurisdiction. Recently, however, federal courts have been faced with the issue of whether to apply the exception in the federal question area. *See, e.g., Peterson v. Babbitt*, 708 F.2d 465 (9th Cir. 1983); *Ruffalo v. Civiletti*, 702 F.2d 710 (8th Cir. 1983). Circuits which construe the exception broadly tend to apply it in the federal question area. *See, e.g., Zak v. Pilla*, 698 F.2d 800 (6th Cir. 1982); *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212 (6th Cir. 1981). Those circuits giving narrow construction to the exception tend not to apply the exception in the federal question area. *See, e.g., Overman v. United States*, 563 F.2d 1287 (8th Cir. 1977). "There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional dimension." *Id.* at 1292.

It is interesting to note that many commentators have assumed that the domestic relations exception applies only to diversity jurisdiction. *See, e.g.,* 13 B. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3609 (2d ed. 1984); Vestal & Foster, *supra* note 2.

12. *Sutter v. Pitts*, 639 F.2d 842, 843 (1st Cir. 1981); *Blank v. Blank*, 320 F. Supp. 1389, 1391-92 (W.D. Pa. 1971); *Druen v. Druen*, 247 F. Supp. 754, 756 (D. Colo. 1965).

13. *See infra* notes 17-35 and accompanying text.

14. *See infra* notes 36-64 and accompanying text.

15. *See infra* notes 65-106 and accompanying text.

16. *See infra* notes 107-163 and accompanying text.

## II. THE ORIGINS OF THE DOMESTIC RELATIONS EXCEPTION

The domestic relations exception did not originate in an unequivocal holding by the United States Supreme Court; rather it evolved from dicta in two Supreme Court cases. In *Barber v. Barber*,<sup>17</sup> the first case in which the Court addressed the authority of the federal courts to entertain domestic relations matters, a wife brought a diversity action against her husband to enforce a previous state court divorce decree awarding her alimony.<sup>18</sup> In upholding federal jurisdiction, the Court emphasized that the plaintiff was only attempting to prevent her husband from fraudulently defying an earlier decree and was not seeking an allowance of alimony.<sup>19</sup> The Court then stated by way of dictum: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce . . . ."<sup>20</sup> The *Barber* majority opinion, however, did not provide a rationale for the domestic relations exception. Interestingly, a rationale for the majority's broad dictum was provided by Justice Daniel's dissent in *Barber*.<sup>21</sup> Many of the cases dealing with the domestic relations exception cite the rationale of the majority's dictum as authority for the exception.<sup>22</sup>

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17. 62 U.S. (21 How.) 582 (1858).

18. *Id.* at 583-84. A decree of divorce was issued from the Court of Chancery for the fourth district of the state of New York, ordering the defendant to pay \$360 per year in support. However, the defendant left New York and subsequently refused to make the yearly payments. *Id.* at 585. The plaintiff then brought suit in federal district court in Wisconsin to enforce the decree. *Id.* at 586.

19. *Id.* at 584.

20. *Id.*

21. *See, e.g., Diruggiero v. Rodgers*, 743 F.2d 1009, 1019 (3d Cir. 1984); *Flood v. Braaten*, 727 F.2d 303, 307 (3d Cir. 1984); *Doe v. Doe*, 660 F.2d 101, 105 (4th Cir. 1981); *Solomon v. Solomon*, 516 F.2d 1018, 1022 (3d Cir. 1975); *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 513 (2d Cir. 1973); *Williamson v. Williamson*, 306 F. Supp. 516, 517 n.5 (W.D. Okla. 1969); *Garberson v. Garberson*, 82 F. Supp. 706, 709 (N.D. Iowa 1949).

22. *Barber*, 62 U.S. (21 How.) at 602 (Daniel, J., dissenting). Justice Daniel argued that the English ecclesiastical courts had exclusive jurisdiction over marriage and divorce. Therefore, since chancery jurisdiction in England had not extended to actions of divorce or alimony, the federal courts in the United States, as courts of chancery, were without jurisdiction over such actions. *See, e.g., Csibi v. Fustos*, 670 F.2d 134, 136 (9th

The Supreme Court significantly expanded *Barber's* domestic relations exception to include child custody in *In re Burrus*.<sup>23</sup> In *Burrus*, the Court dealt with a habeas corpus action brought by a father to recover custody of his child.<sup>24</sup> After holding that the federal court lacked jurisdiction over the custody dispute because of the absence of essential facts in the habeas petition, the Court stated in dictum that: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."<sup>25</sup> As in *Barber*, the *Burrus* opinion did not provide a rationale for the dictum.

In two other cases decided shortly after *Burrus*, the Supreme Court considered the validity of its broad disclaimer of jurisdiction over domestic matters. In *Simms v. Simms*,<sup>26</sup> the Court reaffirmed its language in *Barber* and *Burrus*.<sup>27</sup> The Court specified, however, that this restriction did not apply to jurisdiction over domestic suits in territorial district courts.<sup>28</sup> Seven years later, in *De La Rama v. De La Rama*,<sup>29</sup> the Court again considered the merits of a territorial divorce dispute. While reaffirming its earlier dicta and offering for the first time a reason for the dicta,<sup>30</sup> the *De La Rama* Court, nevertheless, ruled that the domestic relations exception is inapplicable to territorial courts.<sup>31</sup>

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Cir. 1982); *Bossom v. Bossom*, 551 F.2d 474, 476 (2d Cir. 1976); *Solomon*, 516 F.2d at 1021 n.9. *But see* *Lloyd v. Loeffler*, 694 F.2d 489, 491 (7th Cir. 1982).

23. 136 U.S. 586 (1890).

24. *Id.* at 592-93. *Burrus* involved a dispute between a father and a grandfather over the custody of a child under a habeas corpus statute. The Supreme Court held that the father was improperly imprisoned for disobeying a child custody order issued in a habeas corpus proceeding because the federal court did not have jurisdiction. Diversity jurisdiction was not at issue in this case. *Id.* at 596.

25. *Id.* at 593-94.

26. 175 U.S. 162 (1899). The question presented to the Supreme Court was whether it had appellate jurisdiction to review a divorce and alimony decree granted by Arizona's territorial court. *Id.* at 165.

27. *Id.* at 167.

28. *Id.* at 167-68.

29. 201 U.S. 303 (1906). *De La Rama* involved an appeal from a divorce suit brought in a court of first instance in the Phillipines. *Id.* at 304.

30. The *De La Rama* Court's justifications for the exception included the difficulty of establishing diversity and the impossibility of meeting the jurisdictional amount in a case. *Id.* at 308. These rationales appear to be only technical obstacles which can be satisfied in certain cases.

31. *Id.*

The final Supreme Court decision in the evolution of the domestic relations exception was *Ohio ex rel Popovici v. Agler*.<sup>32</sup> In upholding the state court's jurisdiction, the *Popovici* Court held that the Constitution and statutes must be interpreted in light of the common understanding that the "jurisdiction of the courts of the United States over divorces and alimony always has been denied."<sup>33</sup> As authority for this pronouncement of the domestic relations exception, the opinion cited the dicta from the earlier cases<sup>34</sup> and briefly referred to the rationale proposed by Justice Daniel's dissent in *Barber*.<sup>35</sup>

### III. JUSTIFICATIONS FOR THE EXCEPTION

The Supreme Court, through its dicta in *Barber* and *Burrus*, laid the foundation for the domestic relations exception.<sup>36</sup> However, because of the Supreme Court's failure to fully explain the exception, the lower federal courts are principally responsible for the development of the justifications for the exception. The federal courts have advanced substantially divergent interpretations of the nature of the exception. The major issue is whether the exception is derived from a lack of constitutional and/or statutory power,<sup>37</sup> or whether it is a discretionary surrender of jurisdiction based on policy grounds.<sup>38</sup> If a court bases the existence of the exception on its lack of power, its discretion is severely limited. Alterna-

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32. 280 U.S. 379 (1930). An Ohio state court awarded temporary alimony in a divorce action against the vice-consul of Romania. *Id.* at 382.

33. *Id.* at 383.

34. *Id.*

35. *Id.* at 384. Justice Holmes writing for the Court in *Popovici* made the following brief reference to Justice Daniel's rationale: "Suits against consuls and vice consuls, must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts." *Id.*

36. See *supra* notes 17-25 and accompanying text.

37. See, e.g., *Solomon v. Solomon*, 516 F.2d 1018, 1024 (3d Cir. 1975) ("federal courts do not have jurisdiction in domestic relations suits"); *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (2d Cir. 1967) ("it has been uniformly held that federal courts do not adjudicate cases involving the custody of minors, and . . . rights of visitation"); *Williamson v. Williamson*, 306 F. Supp. 516 (W.D. Okla. 1969) (subject matter jurisdiction is completely lacking in federal court in spite of the fact that the requirements of § 1332 have not been satisfied).

38. See, e.g., *Goins v. Goins*, 777 F.2d 1059 (5th Cir. 1985). "Federal courts traditionally decline to hear cases involving the subject matter of 'domestic relations' despite the existence of diversity of citizenship." *Id.* at 1061. *Crouch v. Crouch*, 566 F.2d 486, 487-88 (5th Cir. 1978) (applicability of domestic relations exception in light of policy

tively, if a court relies on the policy rationales, it is free to consider changes that would expand its jurisdiction in domestic relations matters.<sup>39</sup>

Some courts have not distinguished between the constitutional and statutory power to hear and decide a domestic relations matter.<sup>40</sup> The failure to distinguish between these lack of power rationales appears to be of little practical significance because under either rationale the courts' discretion is limited to its initial determination of whether the case is a "domestic relations matter."<sup>41</sup> In addition, some courts have chosen to combine the lack of power and the policy rationales in their analyses.<sup>42</sup> Because the lack of power rationales are alternatives to the policy rationales rather than their complements, the merger of these rationales produces confusion and unpredictability.<sup>43</sup>

### A. Constitutional Justifications

The constitutional justifications for the domestic relations exception may be divided into two categories: The separation

considerations); *Kilduff v. Kilduff*, 473 F. Supp. 873 (S.D.N.Y. 1979) (federal court may decline jurisdiction if tortious conduct arose from the marital relationship).

39. The presence of a strong state interest in family law matters appears to have declined. For example, the development of no-fault divorce in a majority of states and the relaxation of the requirements of who may marry suggest that the state interest in regulating domestic relations is no longer as strong as it once was. See KRAUSE, *CASES AND MATERIALS ON FAMILY LAW* 804 (1976). See also CLARK, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 12 (3d ed. 1980).

40. See, e.g., *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir.), cert. denied, 459 U.S. 1014 (1982); *Turpin v. Turpin*, 415 F. Supp. 12 (W.D. Okla. 1975).

41. See Wand, *A Call For the Repudiation of the Domestic Relations Exception to Federal Jurisdiction*, 30 VILL. L. REV., 307, 335 (1985).

42. See, e.g., *Csibi v. Fustos*, 670 F.2d 134, 137 (9th Cir. 1982); *Welker v. Metropolitan Life Ins. Co.*, 502 F. Supp. 268, 269-70 (C.D. Cal. 1980).

It is interesting to note that the Ninth Circuit in *Csibi* developed a two-tiered analysis. If a case was "at the core of the domestic relations exception," the circuit would have no subject matter jurisdiction. *Csibi*, 670 F.2d at 137. However, "where domestic relations problems are involved tangentially to other issues determinative of the case" the circuit court may exercise discretion in deciding whether to accept jurisdiction. *Id.*

43. For example, initially the *Welker* court states that it "should decline jurisdiction" if the primary issue in the case is the status of the husband and wife. *Welker*, 502 F. Supp. at 269 (citing *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968)). However, the court later states that the case was "not within the power granted to federal courts . . ." *Welker*, 502 F. Supp. at 270. The lack of consistency within this case illustrates the lack of uniformity among the lower courts in interpreting the rationales for the exemption.



of powers justification and the federalism justification.<sup>44</sup> The separation of powers argument focuses solely on the lack of power of the federal courts to hear domestic relations cases. This justification is based on two premises: (1) the jurisdiction of the federal courts is the same as the English chancery courts at the time of the Revolution;<sup>45</sup> and (2) at the time of the Revolution, the English ecclesiastical courts had exclusive jurisdiction over domestic relations cases.<sup>46</sup> Consequently, the judicial power over domestic relations lies solely in the state courts.<sup>47</sup> The constitutional rationale of federalism focuses on the allocation of power between the state and federal governments. This rationale relies upon the premise that the federal government possesses enumerated and limited powers.<sup>48</sup> Therefore, some courts argue that the power to regulate domestic relations is reserved to the states because the power is not granted expressly to the federal government in the Constitution.<sup>49</sup>

### B. Statutory Justifications

Federal courts have also offered statutory justifications for the domestic relations exception.<sup>50</sup> It has been suggested that the *Barber* Court's broad disclaimer of jurisdiction over domestic relations was based on the Judiciary Act of 1789,<sup>51</sup> which asserted that federal courts have the power to hear "suits of a civil nature at common law or in equity."<sup>52</sup> Be-

44. Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 B.C.L. REV. 661, 684 (1983).

45. *Waterman v. Canal-Louisiana Bank and Trust Co.*, 215 U.S. 33, 43 (1909); *Jackson v. United States Nat'l Bank*, 153 F. Supp. 104, 109 (D. Or. 1957); *Albanese v. Richter*, 67 F. Supp. 771, 773 (D. N.J. 1946), *aff'd*, 161 F.2d 688 (3d Cir.), *cert. denied*, 332 U.S. 782 (1947).

46. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 621-24 (3d ed. 1922).

47. *Hoadly v. Chase*, 126 F. 818, 821 (C.C.D. Ind. 1904).

48. See U.S. CONST. amend. X. The tenth amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

49. See, e.g., *Blank v. Blank*, 320 F. Supp. 1389, 1390 (W.D. Pa. 1971); *Williamson v. Williamson*, 306 F. Supp. 516, 518 (W.D. Okla. 1969).

50. See *Hernstadt v. Hernstadt*, 373 F.2d 316, 318 (2d Cir. 1967); *Clifford v. Williams*, 131 F. 100, 102 (C.C.D. Wash. 1904).

51. *Spindel v. Spindel*, 283 F. Supp. 797, 802 (E.D.N.Y. 1968). See also C. WRIGHT, *supra* note 2, § 25, at 143.

52. Act of Sept. 24, 1789, Sec. 11, 1 Stat. 78.

cause the power to grant divorces or alimony did not fall within either common law or equity jurisdiction referred to in the Judiciary Act, there could be no federal court jurisdiction over these matters.<sup>53</sup> The Supreme Court itself has also focused on whether husbands and wives could establish the diverse citizenship required by the diversity statute.<sup>54</sup> The Supreme Court in *De La Rama* held that "the husband and wife cannot usually be citizens of different states, so long as the marriage relation continues."<sup>55</sup> In light of this holding, it appears that diversity jurisdiction between geographically separated spouses is precluded. The final statutory justification enunciated by the courts is that domestic relations matters cannot be assigned a pecuniary value.<sup>56</sup> Courts have specifically held that marital status<sup>57</sup> and child custody<sup>58</sup> are matters which cannot be measured by a pecuniary standard. If these matters are incapable of satisfying the \$10,000 "amount in controversy" requirement of the diversity statute, diversity jurisdiction cannot be established.

### C. Policy Justifications

Although many courts doubt the validity of the constitutional and statutory rationales for the domestic relations exception, they frequently offer policy considerations to justify the exception.<sup>59</sup> Courts have generally advanced three policy considerations. First, several courts have held that state courts have a particular competence and expertise in domestic matters.<sup>60</sup> It has been suggested that state courts can process a large volume of cases more efficiently and monitor family situations more effectively.<sup>61</sup> Second, courts have focused on

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53. C. WRIGHT, *supra* note 2, § 25, at 143.

54. *De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906); *Barber v. Barber*, 62 U.S. (21 How.) 582, 602 (1858) (Daniels, J., dissenting).

55. *De La Rama*, 201 U.S. at 307.

56. *Rapoport v. Rapoport*, 416 F.2d 41, 43 (9th Cir. 1969); *Clifford v. Williams*, 131 F. 100, 102 (C.C.D. Wash. 1904); *Walpert v. Walpert*, 329 F. Supp. 25, 26 (D. N.J. 1971).

57. *Rapoport*, 416 F.2d at 43; *Walpert*, 329 F. Supp. at 26.

58. *Hernstadt v. Hernstadt*, 373 F.2d 316, 318 (2d Cir. 1967).

59. *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981); *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978).

60. *Firestone*, 654 F.2d at 1215; *Cherry v. Cherry*, 438 F. Supp. 88, 90 (D. Md. 1977).

61. *Firestone*, 654 F.2d at 1215.

the flood of litigation which would result from the repudiation of the exception.<sup>62</sup> In the absence of congressional disapproval of the exception, courts have refused to ignore the exception because of the fear of increasing the number of cases on their already congested dockets. Finally, the exception has been upheld as a way to avoid inconsistencies in federal and state decrees. It has been suggested that the preservation of the exception will allow a uniform system of state regulation.<sup>63</sup> Proponents of the exception hold that repudiation of the exception would lead to incompatible federal and state decrees, which would significantly erode state interest in domestic matters.<sup>64</sup>

#### IV. INTERPRETATIONS OF THE DOMESTIC RELATIONS EXCEPTION

While the domestic relations exception is firmly established in every circuit,<sup>65</sup> each circuit has developed its own approach in dealing with domestic relations matters. Some circuits have construed the exception narrowly,<sup>66</sup> while others have interpreted the exception more broadly to foreclose jurisdiction in a greater number of cases.<sup>67</sup> The variety of interpretations utilized by the circuit courts demonstrates their current confusion as to the scope of the exception. Generally, the circuit courts have applied three tests to determine whether a case falls within the domestic relations exception:

62. *Cherry*, 438 F. Supp. at 90; *Thrower v. Cox*, 425 F. Supp. 570, 573 (D. S.C. 1976).

63. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 509 (1954).

64. *Sutter v. Pitts*, 639 F.2d 842, 844 (1st Cir. 1981); *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978).

65. See, e.g., *Ruffalo v. Civiletti*, 702 F.2d 710, 717 (8th Cir. 1983); *Lloyd v. Loefler*, 694 F.2d 489, 491-92 (7th Cir. 1982); *Bennett v. Bennett*, 682 F.2d 1039, 1042 (D.C. Cir. 1982); *Cole v. Cole*, 633 F.2d 1083, 1087 (4th Cir. 1980); *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978); *Solomon v. Solomon*, 516 F.2d 1018, 1021-25 (3d Cir. 1975); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968); *Hernstadt v. Hernstadt*, 373 F.2d 316, 317-18 (2d Cir. 1967); *McCarty v. Hollis*, 120 F.2d 540, 542 (10th Cir. 1941); *Robinson v. Robinson*, 523 F. Supp. 96, 97-98 (E.D. Pa. 1981); *Lutsky v. Lutsky*, 310 F. Supp. 517, 518-19 (S.D. Fla. 1970), *aff'd*, 433 F.2d 346 (5th Cir. 1970).

66. See, e.g., *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985); *Bennett*, 682 F.2d at 1042; *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982); *Crouch*, 566 F.2d at 486.

67. *Goins v. Goins*, 777 F.2d 1059 (5th Cir. 1985); *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212 (6th Cir. 1981); *Solomon*, 516 F.2d at 1018.

(1) the modifiability approach;<sup>68</sup> (2) the property-status inquiry;<sup>69</sup> and (3) the nature of the case test.<sup>70</sup>

### A. *Modifiability Test*

In determining whether a particular case falls within the domestic relations exception, some courts draw a distinction between actions involving obligations which are modifiable and actions involving obligations which are not modifiable. Under this determination, a court becomes directly involved in the administration of a domestic relations award.<sup>71</sup> Therefore, modifiable obligations may not be litigated in federal court. In contrast, the enforcement of a nonmodifiable obligation may generally be litigated in federal court because the court's involvement in nonmodifiable matters is not viewed as direct involvement in domestic relations.<sup>72</sup> In entertaining a modification action involving alimony, visitation, or child support, a federal court would examine the factors which the state statute sets forth as relevant to the modification.<sup>73</sup> These statutory factors are seen as matters which are within the special expertise and particular interest of the state courts.<sup>74</sup> Accordingly, the implementation of the domestic relations exception under the modifiability test is based on policy grounds.

Courts have reached distorted results through the use of the modifiability test. For example, courts have allowed damages for interference with a current child custody award without reconsidering the propriety of the original custody award or the appropriateness of an injunction ordering contin-

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68. See *infra* notes 71-76 and accompanying text.

69. See *infra* notes 77-88 and accompanying text.

70. See *infra* notes 89-106 and accompanying text.

71. *Goins*, 777 F.2d at 1059; *Jagiella v. Jagiella*, 647 F.2d 561 (5th Cir. 1981); *Morris v. Morris*, 273 F.2d 678 (7th Cir. 1960).

72. *Lee v. Hunt*, 431 F. Supp. 371 (W.D. La. 1977); *Turpin v. Turpin*, 415 F. Supp. 12 (W.D. Okla. 1975).

73. See, e.g., WIS. STAT. § 767.32 (1983-84).

74. In *Morris*, 273 F.2d at 681-82, the Seventh Circuit stated:

[The] efforts by the district court to assume the broad equitable powers of a divorce court in passing upon the questions which might arise as to the continuance of the obligation of defendant to make the periodic payments, despite the possibility of changing circumstances in the future, would involve the district court in the administration of divorce law in a very real way. . . .

uing enforcement of custody.<sup>75</sup> Although litigants may only seek damages for past breaches in some instances, they may also be concerned with potential future breaches.<sup>76</sup> If a federal court is chosen and the court applies the modifiability test, the litigant is placed in the position of having to accept only damages for past breaches, which is only a partial remedy.

### B. *Property-Status Test*

Some courts, in analyzing and defining the appropriate scope of the domestic relations exception, apply a "property-status" test to determine whether a particular case falls within the exception.<sup>77</sup> Under the property-status approach, federal courts "must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife."<sup>78</sup> For example, federal courts are asked primarily to determine the "status" of the parties in suits involving habeas corpus petitions for custody,<sup>79</sup> suits of divorce,<sup>80</sup> and adoption proceedings.<sup>81</sup> Under the property-status approach, however, federal courts are not precluded from deciding conflicts between family members involving property rights where no question of status is presented.<sup>82</sup> This approach upheld jurisdiction in an action to collect damages for a breach of a separation agreement,<sup>83</sup> as well as an action to enforce alimony payments in a divorce or separation decree<sup>84</sup> because only property questions were in-

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75. See, e.g., *Lloyd v. Locffleur*, 694 F.2d 489, 493 (7th Cir. 1983); *Bennett v. Bennett*, 682 F.2d 1039, (D.C. Cir.), cert. denied, 459 U.S. 1014 (1982). But see *Goins v. Goins*, 777 F.2d 1059 (5th Cir. 1985). In *Goins*, the Fifth Circuit even refused to grant damages. *Id.* at 1060.

76. However, in *Ruffalo v. Civiletti*, 702 F.2d 710, 717 (8th Cir. 1983), the court held that the domestic relations exception does not bar the granting of an injunction to compel the return of a child.

77. See, e.g., *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968); *Welker v. Metropolitan Ins. Co.*, 502 F. Supp. 268 (C.D. Cal. 1980).

78. *Buechold*, 401 F.2d at 372.

79. *Carqueville v. Woodruff*, 153 F.2d 1011 (6th Cir. 1946).

80. *In re Wilson*, 314 F. Supp. 271 (E.D. Tenn. 1970).

81. *In re Freiberg*, 262 F. Supp. 482 (E.D. La. 1967).

82. See, e.g., *Southard v. Southard*, 305 F.2d 730 (2d Cir. 1962); *Vann v. Vann*, 294 F. Supp. 193 (E.D. Tenn. 1968).

83. *Richie v. Richie*, 186 F. Supp. 592 (E.D.N.Y. 1960).

84. *Barber v. Barber*, 62 U.S. (21 How.) 582, 583 (1858).

volved. Moreover, it has been suggested that federal courts are entitled to hear suits to establish maintenance and support brought outside the divorce action.<sup>85</sup>

The property-status test is built upon the premise that property and status matters are distinct. Support for the distinction between property and status questions can be found in *Maynard v. Hill*,<sup>86</sup> where the Supreme Court held that “[i]f the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented.”<sup>87</sup> This language has been interpreted as suggesting that states should not have exclusive jurisdiction over property rights issues simply because they arise out of the same factual situation as the status issues.<sup>88</sup> Assuming property and status questions are separate, it seems only logical that they be recognized as such by the courts.

### C. Nature Of The Case

Some courts apply a “nature of the case” test to determine whether a particular case is embraced by the exception.<sup>89</sup> This approach involves an examination of the subject matter of the actual dispute and a consideration of how the actual dispute related to domestic concerns.<sup>90</sup> The examination of the facts of a particular case under the “nature of the case” approach appears to vary from circuit to circuit. Under this approach, however, the courts have generally denied jurisdiction in actions involving divorce,<sup>91</sup> custody rights<sup>92</sup> and support.<sup>93</sup> However, the “nature of the case” approach generally

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85. Vestal & Foster, *supra* note 2, at 29. *But cf.* Albanese v. Richter, 161 F.2d 688 (3d Cir. 1947) (jurisdiction denied over support action).

86. 125 U.S. 190 (1888).

87. *Id.* at 206.

88. *See* Vestal & Foster, *supra* note 2, at 29.

89. For recent cases adopting this approach see *Goins v. Goins*, 777 F.2d 1059 (5th Cir. 1985); *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985); *Bennett v. Bennett*, 682 F.2d 1042 (D.C. Cir. 1982).

90. *See, e.g.*, *Linscott v. Linscott*, 98 F. Supp. 802, 805, (S.D. Iowa 1951).

91. *Ostrom v. Ostrom*, 231 F.2d 193 (9th Cir. 1955) (divorce action).

92. *Carqueville v. Woodruff*, 153 F.2d 1011 (6th Cir. 1946) (habeas corpus proceeding involving custody).

93. *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968) (action seeking child support).

allows the federal courts to decide tort actions including fraud and suits in contract.<sup>94</sup>

The "nature of the case" approach was adopted by the Fourth Circuit in *Cole v. Cole*,<sup>95</sup> in which the plaintiff, an ex-husband, brought a suit in federal court for compensatory and punitive damages against his ex-wife. The plaintiff alleged malicious prosecution, abuse of process, arson and conversion.<sup>96</sup> The trial court dismissed the action on the basis of the domestic relations exception.<sup>97</sup> On appeal, the Fourth Circuit reversed, stating "[a court] must consider the exact nature of the rights asserted or of the breaches alleged."<sup>98</sup> The *Cole* court engaged in a two part inquiry in applying the "nature of the case" approach. The first element of the *Cole* analysis is whether the claims could only be brought between family members.<sup>99</sup> The second element is whether a particular action requires for its resolution the existence of any rule particularly marital in nature.<sup>100</sup> The *Cole* court concluded that if an action could arise between strangers and would be cognizable outside the law of domestic relations, then the case "does not present any true domestic relations claim."<sup>101</sup> The *Cole* analysis illustrates a careful scrutiny of the facts. This level of scrutiny results in a narrow interpretation of the domestic relations exception.

Not all courts engage in an intense scrutiny of the facts in a particular case. When a court abstains from an intense scrutiny of the facts, it tends to take a broad view of the exception. For example, in *Bacon v. Bacon*,<sup>102</sup> where a woman sought to recover damages for emotional distress, the court held that "[s]tripped of its verbiage this is no more — and no less —

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94. *Dailey v. Parker*, 152 F.2d 174 (7th Cir. 1945) (wife enticed husband to leave their children); *Spindel v. Spindel*, 283 F. Supp. 797 (E.D.N.Y. 1968) (action for fraud).

95. 633 F.2d 1083 (4th Cir. 1980).

96. *Id.* at 1085-87.

97. *Id.* at 1087. In light of the domestic relations exception the court concluded that it did not have subject matter jurisdiction. *Id.*

98. *Id.* at 1088.

99. *Id.*

100. *Id.* For example, the claims of intentional infliction of emotional distress and child enticement originated in tort law, not domestic law. Therefore, these claims cannot be considered "particularly marital in nature". *Id.*

101. *Id.*

102. 365 F. Supp. 1019 (D. Or. 1973).

than a domestic relations case.”<sup>103</sup> Under the *Cole* analysis, federal jurisdiction could have been upheld in *Bacon* because the suit could have arisen between two strangers; the claim was cognizable outside domestic relations law, namely, in tort law.

The failure of the circuit courts to scrutinize the facts in a uniform manner leads to schizophrenic results. The circuit courts’ application of the “nature of the case” approach has been further complicated by the fact that some circuits have developed their own labels for what is essentially the “nature of the case” approach. The Ninth Circuit describes its criterion as the “primary issue” inquiry,<sup>104</sup> while the District of Columbia Circuit focuses on the essence of the case.<sup>105</sup> The interpretations and application of the “primary” and “essence” approaches has led to inconsistent holdings between the circuits.<sup>106</sup>

## V. ANALYSIS

### A. Critique of Interpretations

There are numerous problems with the application of the three approaches used by the circuit courts to determine the scope of the domestic relations exception. These problems are illustrated by an analysis of three recent federal court decisions: *Raftery v. Scott*,<sup>107</sup> *Bennett v. Bennett*,<sup>108</sup> and *Goins v. Goins*.<sup>109</sup>

In *Raftery*, the plaintiff, William Raftery, sought damages for intentional infliction of emotional distress from his former

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103. *Id.* at 1020. In addition the court asserted that “[t]he language of the complaint shows this to be part of an ongoing series of disputes centering around the dissolved but still stormy relationship and status of — and harm to — their children.” *Id.*

104. *See, e.g., Csibi v. Fustos*, 670 F.2d 134, 137 (9th Cir. 1982); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968).

105. *Bennett v. Bennett*, 682 F.2d 1039, 1042 (D.C. Cir. 1982).

106. Under the “essence” test in *Bennett* the court found that the domestic relations exception did not bar a tort claim. *Bennett*, 682 F.2d at 1042. However, the application of the “primary issue test” in *Csibi* lead the Ninth Circuit to conclude that the existence of a tort claim did not “circumvent” the exception. *Csibi*, 670 F.2d at 138.

107. 756 F.2d 335 (4th Cir. 1985).

108. 682 F.2d 1039 (D.C. Cir. 1982).

109. 777 F.2d 1059 (5th Cir. 1985).



wife.<sup>110</sup> The plaintiff alleged that the distress was a result of the defendant's effort to destroy his relationship with his son.<sup>111</sup> The Fourth Circuit affirmed a verdict against the defendant of \$40,000 in compensatory damages and \$10,000 in punitive damages.<sup>112</sup> The court's reasoning rested on two grounds. Initially, the court applied the "nature of the case" approach which was enunciated in the *Cole* decision. The *Raftery* court directly stated that the claim for emotional distress could be brought by those other than family members.<sup>113</sup> In addition, by holding that the tort claim of intentional infliction of emotional distress was "in no way dependent on a present or prior family relationship,"<sup>114</sup> the court implied that the tortious nature of the claim entitled the plaintiff to bring the case to federal court. Because the plaintiff's claim was a cognizable tort claim, it was outside the law of domestic relations. Therefore, the second element of the *Cole* "nature of the case" approach was satisfied.<sup>115</sup>

The *Raftery* court then engaged in the property-status inquiry.<sup>116</sup> The court concluded that in granting jurisdiction for a damage claim caused by emotional distress, it was not being asked to make "a determination of entitlement to custody or any other adjustment of family status."<sup>117</sup> Although the court did not directly apply the property-status approach, it implicitly did so by stating that it was not faced with a status question. Under the facts of *Raftery*, both the "nature of the case" inquiry and the property-status approach support federal jurisdiction.

In *Bennett*, the plaintiff, a divorced father, brought an action in tort seeking monetary damages and injunctive relief against his former wife for the alleged kidnapping of their

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110. *Raftery*, 756 F.2d at 337.

111. *Id.* at 336.

112. *Id.*

113. *Id.* at 337-38.

114. *Id.* at 338 (quoting *Wasserman v. Wasserman*, 671 F.2d 832, 834-35 (4th Cir.), cert. denied, 459 U.S. 1014 (1982)).

115. See *Cole v. Cole*, 633 F.2d 1083, 1088 (4th Cir. 1980). A tort action for intentional infliction of emotional distress has been held to be outside the law of domestic relations. See also *Wasserman*, 671 F.2d at 834; *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (Ct. App. 1977).

116. *Raftery*, 756 F.2d at 338.

117. *Id.* at 338 (quoting *Wasserman*, 671 F.2d at 835).

child.<sup>118</sup> The *Bennett* court subdivided the issue into a discussion of jurisdiction over the monetary damages requested and the injunctive relief sought. In holding that it had jurisdiction to decide the damage issue, the court remanded the cause of action for damages.<sup>119</sup> However, the court held that it did not have jurisdiction to grant injunctive relief.<sup>120</sup>

In upholding its jurisdiction over the claim for monetary damages, the *Bennett* decision is consistent with the *Raftery* decision in that both applied the "nature of the case" inquiry and the property-status approach. However, in its analysis of the issue of injunctive relief, the *Bennett* court abandoned the dual approach it adopted in its decision to grant jurisdiction over damages. As to the issue of injunctive relief, the *Bennett* court relied solely on the property-status approach, while ignoring the "nature of the case" approach.<sup>121</sup> In deciding whether to grant injunctive relief under the property-status approach, the court would have had to inquire into the present status of the child. Therefore, the court chose to decline jurisdiction as to this issue.<sup>122</sup> If the *Bennett* court would have applied the "nature of the case" approach as it was later used in *Raftery*,<sup>123</sup> it would have determined that a claim for injunctive relief could have been brought by a non-family member and that the rules of law governing child enticement are derived from tort law, not domestic law.<sup>124</sup> Therefore, under this approach, the *Bennett* court would have had jurisdiction to decide the injunctive relief issue. Under the facts of *Bennett*, the "nature of the case" approach and the property-status approach would have given clearly inconsistent results.

The *Bennett* decision illustrates that the different approaches used to determine whether a case falls within the domestic relations exception cannot always be reconciled. In addition, Judge Edward's dissenting opinion in *Bennett* points out that the application of these approaches may lead to irra-

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118. *Bennett*, 682 F.2d at 1041.

119. *Id.* at 1044.

120. *Id.*

121. *Id.*

122. *See supra* notes 77-88 and accompanying text.

123. *See supra* notes 113 and 115 and accompanying text.

124. *See Cole v. Cole*, 633 F.2d 1083, 1088 (4th Cir. 1980).

tional and distorted results.<sup>125</sup> For example, in *Bennett*, the plaintiff is entitled only to sue repeatedly for damages without getting his child back.<sup>126</sup> Ironically, this result would not occur if the suit was brought by a non-family member.

In *Goins*, the plaintiff filed a suit against her former husband for conspiring and wrongfully taking their child.<sup>127</sup> The plaintiff sought damages for intentional infliction of emotional distress and civil conspiracy and a modification of a state court custody order.<sup>128</sup> On appeal, the Fifth Circuit affirmed the dismissal of the case in its entirety on the basis of the domestic relations exception.<sup>129</sup> Interestingly, the *Goins* court made no attempt to separately address the claim for damages and the modification of the custody order in its analysis. This failure to separate the claims is in direct contrast to the approach used in *Bennett*.<sup>130</sup>

In reaching its determination, the *Goins* court applied the modifiability approach and the "nature of the case" approach.<sup>131</sup> The modifiability approach mandates the dismissal of the claim for the modification of custody because actual modification is being sought.<sup>132</sup> Nevertheless, jurisdiction over the issue of damages seems appropriate under the modifiability approach because the court is not being asked to modify a previous decision.

The *Goins* court also advocated a "broad inquiry" into the "nature of the claim,"<sup>133</sup> similar to the inquiry in *Bacon v. Bacon*.<sup>134</sup> This "broad inquiry" approach appears to be a means to an end, the end being the dismissal of the case. The "broad inquiry" approach fails to provide the court with an

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125. *Bennett*, 682 F.2d at 1045 (Edwards, J., dissenting).

126. *Id.*

127. *Goins*, 777 F.2d at 1060.

128. *Id.* at 1060.

129. *Id.* at 1063.

130. *Bennett*, 682 F.2d at 1042. The *Bennett* court discussed the claims for damages and injunctive relief separately. In light of the differences between these two remedies it seems logical to address the remedies separately. Nevertheless, the *Bennett* decision is suspect because of the court's failure to apply the "nature of the case" inquiry to the claim for injunctive relief.

131. *Goins*, 777 F.2d at 1061.

132. *Id.*

133. *Id.* (quoting *Bacon v. Bacon*, 365 F. Supp. 1019, 1020 (D. Or. 1973)).

134. 365 F. Supp. 1019 (D. Or. 1973).

adequate procedure to examine the facts of a case.<sup>135</sup> Rather than providing the court with any structure or guidance, the "broad inquiry" approach allows the court to essentially decide a case according to its own personal preference. If the *Goins* court would have used the "nature of the case" approach as enunciated in *Raftery*, it would have determined that the plaintiff's claims could have been brought by a non-family member, and that the relief sought was derived from tort law.<sup>136</sup> Consequently, the application of the *Raftery* "nature of the case" approach would have granted jurisdiction.

It is apparent that in *Goins* the application of *Raftery* "nature of the case" approach and the modifiability approach would have yielded clearly inconsistent results. More importantly, the *Goins* opinion illustrates that depending on the manner in which a specific approach is construed and applied, specifically the "nature of the case" approach, a court may reach different conclusions.

### B. Critique Of The Justifications

Both constitutional justifications for the domestic relations exception, based on separation of powers and federalism, are seriously flawed. The historical support for the separation of powers rationale is less than conclusive. Historically, federal courts are viewed as having the same jurisdiction that the English chancery courts had at the time of the Revolution.<sup>137</sup> Proponents of the domestic relations exception have argued that the English ecclesiastical courts had exclusive jurisdiction over domestic matters.<sup>138</sup> In fact, the chancery courts had significant, if limited, jurisdiction over domestic matters. For example, the chancery enforced separation agreements,<sup>139</sup>

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135. *Raftery*, 756 F.2d at 337-38.

136. See, e.g., *Wasserman v. Wasserman*, 671 F.2d 832, 834-35 (4th Cir.), cert. denied, 459 U.S. 1014 (1982); *Cole v. Cole*, 633 F.2d 1083, 1088 (4th Cir. 1980).

137. *Barber v. Barber*, 62 U.S. (21 How.) 582, 602-05 (1858) (Daniel, J., dissenting). Jurisdictional disputes in areas other than domestic relations were guided by the fact that the federal courts have the same authority at common law and in equity as did the English chancery courts. *Id.*

138. See, e.g., *Ohio ex rel Popovici v. Agler*, 280 U.S. 379, 384 (1930); *Csibi v. Fustos*, 670 F.2d 134, 137-38 (9th Cir. 1982); *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 513-14 (2d Cir. 1973).

139. *Head v. Head*, 26 Eng. Rep. 972 (Ch. 1745).

decided the validity of marriage suits,<sup>140</sup> and issued extraordinary writs<sup>141</sup> in the domestic relations context. Therefore, if the federal courts' jurisdiction is the same as the chancery courts, it appears that federal courts are not foreclosed from deciding domestic relations matters.<sup>142</sup>

The separation of powers rationale is also tenuous in light of the Supreme Court's decision in *Simms v. Simms*<sup>143</sup> and *De La Rama v. De La Rama*.<sup>144</sup> In both cases, the Court upheld the power of the federal courts to hear divorce suits in the territories. The fact that the federal courts may enforce a domestic relations policy which is promulgated by a territorial legislature<sup>145</sup> indicates that there is no constitutional bar based on separation of powers. The federalism justification is also weak, despite the fact that the federal government has no power to directly regulate domestic concerns. In reliance upon the federalism justification, courts have held that the power to regulate domestic matters is reserved to the states.<sup>146</sup> These courts, however, have failed to recognize the crucial distinction between the power to create substantive rules of law and the power to decide a case.

The federalism rationale stands for the proposition that the federal courts have no power to create substantive law in domestic matters. This is not the same as holding that federal courts do not have subject matter jurisdiction over domestic matters. The fact that federal courts under *Erie Railroad Co. v. Tompkins*,<sup>147</sup> are compelled to apply state law in diversity cases suggests that federal courts may decide domestic matters. Specifically, *Erie* suggests that when the federal courts exercise diversity jurisdiction, they are being asked to decide

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140. *Pride v. Earl of Bath*, 83 Eng. Rep. 755 (K.B. 1700).

141. *Heyn's Case*, 35 Eng. Rep. 288 (Ch. 1813).

142. The overlap in jurisdiction between the chancery and ecclesiastical courts of England was outlined in *Spindel v. Spindel*, 283 F. Supp. 797, 802-03 (E.D.N.Y. 1968) (cites numerous English precedent). Recently courts have questioned the validity of this justification. See, e.g., *Lloyd v. Loeffler*, 694 F.2d 489, 491-92 (7th Cir. 1982); *Sutter v. Pitts*, 639 F.2d 843, 843-44 (1st Cir. 1981).

143. 175 U.S. 162 (1899).

144. 201 U.S. 303 (1906).

145. *De La Rama*, 201 U.S. at 308; *Simms*, 175 U.S. at 168.

146. *Blank v. Blank*, 320 F. Supp. 1389, 1390 (W.D. Pa. 1971).

147. 304 U.S. 64 (1938).

matters over which they have no power to "make law."<sup>148</sup> Thus, the conclusion that federal courts lack subject matter jurisdiction over domestic matters appears to be in direct conflict with the concept of diversity jurisdiction as enunciated in *Erie*.<sup>149</sup>

The earliest of the statutory justifications, that the power to grant divorces or alimony did not fall within common law or equity jurisdiction, is also questionable.<sup>150</sup> The justification appears to no longer have any force because equity and law jurisdictions were merged into jurisdiction over "civil actions" in 1948.<sup>151</sup> Thus, it is moot whether domestic matters were included in law or equity jurisdiction. The statutory rationale that no diversity jurisdiction can exist between spouses<sup>152</sup> is also invalid.<sup>153</sup> Today, it is recognized that diversity jurisdiction exists so long as a person establishes citizenship different from that of his or her spouse.<sup>154</sup>

In limited instances the final statutory justification, which concerns the amount in controversy, appears to be the only valid nonpolicy rationale.<sup>155</sup> The argument that the requisite \$10,000 "amount in controversy" cannot be satisfied is applicable in cases such as child custody actions.<sup>156</sup> However, the pecuniary value argument is equally applicable to all cases concerning diversity jurisdiction. Because this argument is not exclusive to domestic relations, it loses much of its force.

Although the policy justifications for the exception are more compelling than the constitutional or statutory justifications, they too can be effectively rebutted. The state expertise or competence rationale is probably the least convincing

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148. *Id.*

149. To argue that federal courts lack subject matter jurisdiction is inconsistent. When federal courts exercise diversity jurisdiction they are deciding matters over which the federal government has no power to "make" law.

150. *See supra* notes 50-53 and accompanying text.

151. C. WRIGHT, *supra* note 2, § 25, at 97. It is interesting to note that the Revisor's Notes to 28 U.S.C. § 1332 suggest that the sole purpose of this amendment was to achieve conformity with the language of Rule 2 of Federal Rules of Civil Procedure. 28 U.S.C.A. § 1332 (West 1966) (Historical and Revisors Notes).

152. This argument was presented in *Solomon v. Solomon*, 516 F.2d 1018, 1021 (3d Cir. 1975).

153. *See De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906).

154. R. LEFLAR, *AMERICAN CONFLICTS LAW* § 11, at 23 (1968).

155. *See supra* notes 56-58 and accompanying text.

156. *Clifford v. Williams*, 131 F. 100, 102 (C.C.D. Wash. 1904).

of the policy rationales. Undoubtedly, state courts have greater expertise and competence in domestic affairs.<sup>157</sup> However, this rationale is more a statement about the result of the years of application of the exception rather than a justification for it. There is simply no reason to believe that federal judges would be unable to master the subject of domestic relations. Courts invoking the exception often rely on the "practical reason" that allowing domestic matters into the federal courts would only add to the already congested federal dockets.<sup>158</sup> The validity of this justification is suspect in light of the Supreme Court's language in *Thermtron Products, Inc. v. Hermansdorfer*.<sup>159</sup> In *Thermtron*, the Court stressed the impropriety of the federal courts refusing to hear cases solely because they are "too busy."<sup>160</sup>

In addition, the argument that the exception is necessary to preserve the strong state interest in domestic relations by maintaining a uniform system of state regulation is also unconvincing.<sup>161</sup> It is tenuous to assert that federal judges will not apply state domestic law in a less uniform manner than state judges. The *Erie* decision compels a federal court to apply state substantive law.<sup>162</sup> Furthermore, the general relaxation in the regulation of marriage and divorce by the states illustrates the decline of the state interest in domestic matters.<sup>163</sup>

## VI. PROPOSAL: ABOLISHMENT

The foregoing discussion demonstrates that the federal courts' application of the domestic relations exception re-

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157. See, e.g., *Ruffalo v. Civiletti*, 702 F.2d 710, 717 (8th Cir. 1983); *Armstrong v. Armstrong*, 508 F.2d 348, 350 (1st Cir. 1974); *Buechold v. Ortiz*, 401 F.2d 371, 373 (9th Cir. 1968).

158. See, e.g., *Cherry v. Cherry*, 438 F. Supp. 88, 90 (D. Md. 1977) (overcrowded dockets rationale has been used by the courts in other contexts other than domestic relations); *Thrower v. Cox*, 425 F. Supp. 570 (D.S.C. 1976). "We [do not] need to create an additional bureaucracy to needlessly duplicate these state services." *Id.* at 573.

159. 423 U.S. 336 (1976).

160. *Id.* at 344.

161. For examples of cases relying on this justification see *Sutter v. Pitts*, 639 F.2d 842, 844 (1st Cir. 1981); *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978).

162. *Erie R.R. Co.*, 304 U.S. 64.

163. See *supra* note 39.

mains unpredictable and inconsistent. A more serious problem, however, is that the exception denies access to the federal courts in cases where federal jurisdiction may be especially appropriate. A traditional rationale for diversity jurisdiction is that state courts are biased against out-of-state litigants.<sup>164</sup> Studies have indicated that the possibility of bias against out-of-state litigants enters into the decisions of attorneys as to whether to choose a federal or state court.<sup>165</sup>

Clearly, domestic relations cases present local bias concerns. Both the Uniform Child Custody Jurisdiction Act<sup>166</sup> and the Parental Kidnapping Prevention Act<sup>167</sup> were direct responses to the state courts' penchant for "hometowning."<sup>168</sup> However, the open-ended language of the Uniform Child Custody Jurisdiction Act invited judicial discretion which has been utilized by the state courts to rule in favor of their own residents.<sup>169</sup> In addition, some states have modified child custody decrees issued by other states by awarding custody to their own residents, in contravention of the Parental Kidnapping Prevention Act. When such contravention occurs, federal courts have become involved. As might be expected, the circuit courts have reached inconsistent conclusions as to whether the Parental Kidnapping Prevention Act creates a cause of action in federal courts.<sup>170</sup> These custody determina-

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164. T. Marvell, *The Rationales For Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1342.

165. Goldman & Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93 (1980). (Forty percent of the lawyers felt that local bias against an out-of-state resident was at least slightly important in choosing a forum); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965) (The most commonly cited factors for selecting federal court when representing the plaintiff were discovery, prejudice against out-of-state plaintiffs, pretrial conferences and third party practice.).

166. Uniform Child Custody Jurisdiction at §§ 1-28, 9 U.L.A. 116 (1968).

167. Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1983).

168. See generally Sampson, *What's Wrong With the UCCJA? Punitive Decrees and Hometown Decisions Are Making a Mockery of This Uniform Act*, 3 FAM. ADVOC. 28, 29 (Spring 1981).

169. W. WERYAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 548-51 (1983).

170. See, e.g., *Thompson v. Thompson*, 798 F.2d 1547 (9th Cir. 1986) (Parent Kidnapping Prevention Act creates no cause of action); *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982) (no cause of action is enforceable in federal court). But see *McDougald v. Jenson*, 786 F.2d 1465 (11th Cir. 1986); *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3d Cir. 1984).



tions should be made according to the best interest of the child and not those of the resident litigant.<sup>171</sup> Allowing federal courts to hear custody determinations originally would eliminate local bias, thus ensuring that the child's best interests are served.

The tendency of the state courts to favor their own residents is not necessarily peculiar to child custody questions. Local bias may also threaten the integrity of judgments in disputes involving alimony, child support, or property division. In light of the exception's unconvincing rationales, inconsistent application, and the existence of local bias in domestic matters, it is apparent that the domestic relations exception should be abolished.

The practical effects of abolishing the domestic relations exception would not be as great as proponents of the exception suggest. The inability of litigants to satisfy the diversity of citizenship and the amount in controversy requirements will severely limit the number of domestic relations cases heard in federal court. In addition, despite the availability of a federal forum, many litigants will select state forums instead. Attorneys may choose a state court over a federal court because of lower litigation costs, familiarity with judges, the greater degree of participation by the judges in the trial,<sup>172</sup> and the perception of greater state court expertise in domestic relations. Accordingly, the abolishment of the exception will not cause a flood of domestic relations cases into the federal courts.

## VII. CONCLUSION

The domestic relations exception has dubious historical origins.<sup>173</sup> Nevertheless, the exception has become an engrained tradition in the federal courts. The break with tradition which is necessary to abolish the exception will not come easily.

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171. See, e.g., WIS. STAT. § 767.24(2) (1985-86).

172. Note, *Family Law: Court's Adoption of Uniform Child Custody Jurisdiction Act Offers Little Hope of Resolving Child Custody Conflicts*, 60 MINN. L. REV. 820 (1976).

173. See *supra* notes 17-35 and accompanying text.

The justifications for the exception are outdated and unconvincing. The inconsistency in the application of the exception is unacceptable. Moreover, domestic relations cases involving parties of diverse citizenship present significant problems of local bias which diversity jurisdiction was meant to prevent. Clearly, concerns of fairness and uniformity must override any practical reasons for continued adherence to the exception. Although the abolition of the exception will broaden the range of cases now heard in the federal courts, it is clear that there are sufficient restrictions to limit the number of cases brought to federal court. Consequently, the domestic relations exception ought to be abolished.

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